EDITOR'S NOTE

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86-1642

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
AND WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
AND COLONEL JOSEPH A. YORE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress intended the 1972 amendments to the Federal Water Pollution Control Act to repeal the exclusive authority over hydropower licensing entrusted by Congress since 1920 to the Federal Energy Regulatory Commission and its predecessor, and require specifically that hydropower licensing be subjected to duplicative, *de novo* proceedings by the Commission and by the United States Army Corps of Engineers?

2. Whether the Court of Appeals correctly held that the Federal Energy Regulatory Commission is not required to implement substantive environmental protections in discharging its obligation to issue hydropower licenses "in the public interest"?

CORPORATE LISTING STATEMENT

Petitioners Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company are wholly-owned subsidiaries of Allegheny Power System, Inc. Affiliates of petitioners include Allegheny Power Service Corporation, Allegheny Generating Company, Allegheny Pittsburgh Coal Company, West Virginia Power and Transmission Company, West Penn West Virginia Water Power Company, Ohio Valley Electric Company and Indiana Kentucky Electric Company.

PARTIES

In addition to the parties listed in the caption, the Federal Energy Regulatory Commission intervened as an appellee in the Court of Appeals and sought to have the District Court's decision affirmed. Also, the following parties intervened as defendants in the District Court and sought to have its decision reversed in the Court of Appeals: the Sierra Club, West Virginia Highlands Conservancy, National Wildlife Federation, Environmental Defense Fund, National Audubon Society and the State of West Virginia.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of Circuit Judge Spottswood W. Robinson, III, for the Court of Appeals, joined by Senior District Court Judge Oliver Gasch, sitting by designation (Senior Circuit Judge David L. Bazelon heard argument but did not participate in consideration of the opinion), is reported at 809 F.2d 41 (D.C. Cir. 1987), and a copy thereof is reprinted as Appendix

A. The Memorandum and Order of District Judge John Lewis Smith, Jr., for the District Court is reported at 507 F.Supp. 385 (D.D.C. 1980), *sub nom.*, *Monongahela Power Company* v. *Alexander*, and a copy thereof is reprinted as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1987. A timely suggestion for rehearing *en banc* was denied on March 24, 1987 (by a vote of 7 to 4). *See* Appendix C. An uncontested motion to stay issuance of the mandate was granted by the Court of Appeals on March 24, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The statutes involved are: Sections 4(e), 10(a), and 23(b) of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(a), and 817; and Sections 301(a) and 404(a) of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a) and 1344(a). The full text of these statutory provisions is set forth in Appendix D.

STATEMENT OF THE CASE

The Court of Appeals has decided that Congress, by enacting the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), repealed by implication the exclusive authority for licensing of America's hydropower resources entrusted by Congress since 1920 to the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission ("FPC"). In the exercise of that exclusive jurisdiction the FPC,

based upon a seven-year proceeding in which the United States Army Corps of Engineers ("Corps") participated and raised no objection, issued a license for the construction and operation of a hydroelectric power project to be owned and operated by petitioners. Thereafter, the Corps promulgated regulations purporting to make the project subject to its authority to issue dredge and fill permits under Section 404(a) of the FWPCA, as added by the 1972 amendments. Following a brief, informal review, the Corps then refused to issue the permit, thus vetoing the FPC license.

Petitioners filed suit in the United States District Court for the District of Columbia. On cross-motions for summary judgment, the District Court upheld the exclusive jurisdiction of the FPC, concluding that the Corps has no jurisdiction over projects licensed by the FPC pursuant to the Federal Power Act. Six years after appeal to the United States Court of Appeals for the District of Columbia Circuit and ten years after issuance of the FPC license, the Court of Appeals reversed the District Court, holding that the Corps has not only jurisdiction over the licensing of hydropower projects but in effect a veto power over FPC licenses by refusing issuance of dredge and fill permits under Section 404(a). This decision directly derogates Section 10 of the Federal Power Act, which gives the Commission "comprehensive" licensing authority, and terminates sixty-seven years of exclusive FPC jurisdiction.

Believing that this decision profoundly misconstrues the relationship between two major and longstanding legislative schemes and impermissibly weakens one of

them, petitioners seek review of the Court of Appeals' decision through a writ of certiorari.

1. Proceedings Before the Commission

More than sixteen years ago, on June 3, 1970, petitioners applied to the then-Federal Power Commission[1] pursuant to Sections 4(e), 10(a), and 23(b) of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(a), and 817, for a 50-year license to construct and operate a 1,000 megawatt hydroelectric generating facility in Tucker County, West Virginia. This facility, known as the "Davis Project," is designed to produce electric power through "pumped storage"—a technology in which water is pumped from a lower reservoir to an upper reservoir during off-peak periods using energy derived from power plants otherwise idling at those times of low demand for electricity. The water is then returned through turbine generators when the demand for electricity is greatest. Construction of the Davis Project would involve the erection of a dam and embankments to impound water for the two reservoirs on private property owned by petitioners. In conjunction with the project, petitioners also propose to establish an extensive (over thirteen thousand acres) wildlife and natural resources preserve in the area of the project, a region which is privately owned and open to development. That preserve would protect over four thousand acres of wetlands.

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[1] The Federal Power Commission was redesignated the Federal Energy Regulatory Commission in the 1977 Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977). The two bodies are hereinafter referred to collectively as the "Commission."

The Commission made a thorough analysis of petitioners' proposed project over more than seven years, conducting a series of public hearings on the record before an administrative law judge. The Commission made changes in the project and imposed a large number of substantive requirements. Among other things, the Commission considered the structural feasibility and geological soundness of the Davis Project, the need for the energy to be generated by the facility, its impact upon the environment—particularly upon the affected wetlands areas, numerous alternatives to the proposed project, recreational opportunities arising from the lake that would be formed by the lower reservoir, and a vast wildlife and natural resources preserve proposed to be established in part as "mitigation" for the property to be utilized. *See Monongahela Power Co.*, 58 F.P.C. 451 (1977). The Commission received evidence and comment from a number of parties and interests, including the United States Department of the Interior, the West Virginia Department of Natural Resources, and the Corps itself, which submitted three sets of comments.

The most intensely explored subject during the Commission's seven-year review was the effect that the project and its alternatives would have on the environment. As the administrative law judge concluded:

> The 40 volumes of the hearing transcript deal mainly with the environmental issues raised by the parties. [The FPC] Staff has presented for cross-examination about 15 witnesses who participated in, or contributed material for, the preparation of the [Final

> Environmental Impact Statement]; and it has, in addition, sponsored the testimony of about 10 other expert witnesses, such as those from [the West Virginia Department of Natural Resources] and the U.S. Department of Interior. All parties have been afforded ample opportunity to adduce any and all facts relating to the environmental effects of the project and the alternatives thereto.

58 F.P.C. at 534; *see* J.A. 208.[2] The Corps participated in the Commission's licensing proceeding and in its written comments concerning the project's environmental, navigational, and flood control effects raised no objections. *See* J.A. 81-82, 86-87 and 90.

On April 21, 1977, the FPC issued a forty-four page decision approving the Davis Project and granting to petitioners a 50-year license to build and operate it. The Commission concluded that issuance of a license under the stated terms and conditions "is and will be necessary and desirable in the public interest." 58 F.P.C. at 474.

Some of the intervenors in the FPC proceeding filed petitions for review of the FPC license decision in the United States Court of Appeals for the District of Columbia Circuit pursuant to 16 U.S.C. § 825*l*. Those petitions were consolidated and from 1977 to this day have been awaiting disposition, held in abeyance by the Court of Appeals pending resolution of the question involved in the instant case. *See* App. A at A-4 n.10.

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[2] The term "J.A." refers to the Joint Appendix filed in the Court of Appeals.

2. Proceedings Before The Corps

On July 19, 1977, three months after the Commission issued a license for the Davis Project, the Corps promulgated regulations pursuant to Sections 301(a) and 404(a) of the FWPCA, 33 U.S.C. §§ 1311(a) and 1344(a), purporting for the first time to assert jurisdiction over the project. *See* 42 Fed. Reg. 37146 (1977) (later codified at 33 C.F.R. § 323.3(e)(1982)). Petitioners were required under the terms of the new Corps regulations to obtain a Section 404 "dredge and fill" permit for the project dam before construction of the project could begin; the comprehensive seven-year review of the Davis Project by the FPC and the award of a valid license under the Federal Power Act were irrelevant so far as the Corps was concerned.

Though disputing the Corps' jurisdiction over Commission-licensed projects, petitioners complied with the published regulations in order, they believed, to expedite construction of the licensed project. After the filing by petitioners of a permit application on January 23, 1978, the Corps conducted a brief, informal review, including two "town hall" public hearings with no opportunity for examination or questioning of those making statements. The Corps adopted without revision the Final Environmental Impact Statement prepared by the Commission. J.A. 336-440, and 448.

The Corps, despite its own participation in the Commission's proceeding, denied petitioners' application on July 14, 1978. It cited the impact of the Davis Project on wetlands areas as the key factor in denying the Section 404 permit, but employed no test and addressed no facts that varied in any significant way from the Commission's analysis. *Compare* J.A. 693

(the Corps' decision) *with* J.A. 242-46 and 263 (the Commission's decision).

3. The District Court Proceeding

Petitioners filed this lawsuit on September 12, 1978 in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief that would permit construction of the Davis Project in accordance with the valid Commission license. Petitioners' primary argument was that the Corps was without jurisdiction over the project because Congress had vested exclusive jurisdiction over hydropower projects in the Commission.

The District Court (Judge John Lewis Smith, Jr.) entered judgment for petitioners on December 19, 1980, holding that the Federal Power Act conferred exclusive federal jurisdiction over hydropower projects upon the Commission, and that the Corps was thus without statutory authority to require that the Davis Project obtain a permit under Section 404(a) of the FWPCA. *See* App. B. The District Court's decision was premised upon considerations of legislative intent and upon its conclusion that the FWPCA could not, consistent with principles of statutory construction laid down by this Court, be considered to have repealed by implication the exclusive licensing authority exercised by the Commission under the Federal Power Act.

4. The Court of Appeals Proceeding

Appeals were taken. More than four and one-half years after oral argument before the United States Court of Appeals for the District of Columbia Circuit on June 18, 1982, a two-judge panel of the Court of

Appeals reversed the District Court's judgment.[3] *See* App. A. The Court of Appeals presumed that the FWPCA applied to the construction of hydropower projects and did not consider the resultant elimination of the Commission's exclusive jurisdiction to be inconsistent with legislative intent or to constitute a repeal by implication of the Federal Power Act's exclusive single-agency hydropower licensing scheme. To avoid the difficulties attendant to its creation of overlapping jurisdictional roles for the Commission and the Corps, the Court of Appeals interpreted the Federal Power Act as not imposing upon the Commission a substantive obligation to consider environmental concerns in its licensing decisions.

Petitioners' Suggestion For Rehearing *En Banc* was denied on March 24, 1987. *See* App. C. Circuit Judges Robert H. Bork, Laurence H. Silberman, Stephen F. Williams, and Douglas H. Ginsburg voted in favor of rehearing.

REASONS FOR GRANTING THE WRIT

This case presents questions of exceptional importance to implementation of the nation's laws, and to the way in which courts must interpret major legislative enactments in order to effectuate congressional intent. Specifically at issue in this case are two comprehensive and longstanding programs created by Congress—one governing the licensing of hydropower projects through a centralized single-agency licensing

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[3] Senior District Judge Oliver Gasch of the District of Columbia, sitting by designation, joined in Judge Robinson's opinion. Senior Circuit Judge Bazelon heard argument on the appeal but retired before the panel's opinion was issued and did not participate in its consideration.

process requiring that the Commission evaluate all factors relevant to the public interest, specifically including environmental aspects; the other controlling water pollution from dredge and fill operations through a multi-agency program. The programs, and the policies which they were created to promote, are compatible with one another and complementary.

The Court of Appeals, however, erroneously considered centralized hydropower project licensing to be inconsistent with protection of the environment. To resolve this perceived conflict, it conferred upon itself the authority to effect two major amendments to the Federal Power Act. First, it dismantled the exclusive licensing authority exercised by the Commission since 1920, giving concurrent jurisdiction—and veto power—over hydropower projects to the Corps. But this purported solution produced a new problem, as its effect is to subject hydropower projects to duplicative, *de novo*, nonbinding one-on-the-other environmental reviews by the Commission pursuant to Section 10(a) of the Federal Power Act and by the Corps pursuant to Section 404(a) of the FWPCA. Recognizing that such concurrent environmental responsibility is untenable, the Court of Appeals then emasculated the Federal Power Act yet again, inexplicably stripping the Commission of its established and substantive environmental role in order to avoid any potential duplication of the Corps' permit process.

These actions, by the Court of Appeals' own statement devoid of express legislative support, are contrary both to consistently-expressed congressional intent and to decisions of this Court in every area of the law involved. The Commission's exclusive jurisdiction over hydropower project licensing has been

reaffirmed twice by Congress since passage of the FWPCA Amendments of 1972. And the Commission's statutory obligation to implement environmental protections in licensing decisions has been confirmed by this Court and by the Commission's own published actions, and as recently as last year was confirmed by Congress.

The Court of Appeals' decision has dramatically altered the program prescribed by Congress for hydropower project licensing, and upset the statutory balance between two agencies charged with administration of legislative schemes designed to implement important national policies. It is the product not only of a failure to abide by legislative intent, but of a theory of statutory interpretation prohibited in a consistent line of this Court's decisions. To correct these significant and far-reaching errors and to see that the nation's laws are properly effectuated, the writ of certiorari sought by petitioners should be granted.

I.

ELIMINATION OF THE COMMISSION'S EXCLUSIVE JURISDICTION OVER HYDROPOWER PROJECT LICENSING IS CONTRARY TO CONGRESSIONAL INTENT AND IN CONFLICT WITH BINDING PRECEDENT

To understand the significance of the Court of Appeals' jurisdictional holding, it is necessary first to appreciate Congress' substantial and continuing commitment to the consolidation of all federal hydropower licensing authority in a single agency. Prior to 1920, federal authority over the licensing of hydropower projects was scattered among the Departments of

War, Interior, and Agriculture.[4] There was widespread dissatisfaction with the resulting jurisdictional and policy disputes, and a widely supported effort, led by conservationists, was launched to reformulate the hydropower licensing process. *See First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946). Congress responded in 1920 by passing the Federal Water Power Act,[5] a statute whose express purpose was to create the Federal Power Commission and to consolidate in that body all federal hydropower licensing authority to the fullest extent permitted by the Commerce Clause. *Id.* at 180-81; *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 107 (1965).

In the sixty-seven years since passage of the Federal Power Act, Congress has never altered the Commission's sole jurisdiction over hydropower projects or given any other indication that the exclusiveness of the regulatory scheme has been or should be altered. Indeed, all expressions of congressional intent have been to the contrary. For example, when transferring the FPC's functions to the Federal Energy Regulatory Commission ("FERC") through the De-

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[4] The Secretary of War acting through the Corps of Engineers had authority under the Rivers and Harbors Act of 1899, 30 Stat. 1121 (1899). The Secretary of Agriculture had authority over certain hydroelectric projects under the Act of February 1, 1905, 33 Stat. 628 (1905), and the Secretary of Interior had authority over projects built on lands under his control. J. Kerwin, *Federal Water-Power Legislation* at 105-114.

[5] The name of the Federal Water Power Act was changed to the Federal Power Act in 1935 to reflect the expanded duties of the FPC under Title II of the Public Utility Act of 1935, 49 Stat. 838 (1935).

partment of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), the licensing of hydropower projects was described expressly as within the agency's "exclusive jurisdiction." H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 55, 75, *reprinted in* 1977 U.S. Code Cong. & Admin. News 925, 946.

The Court of Appeals acknowledged that Congress had given the Commission "exclusive jurisdiction" over hydropower projects as described in the 1977 Conference Report but, through reference to a novel distinction between "vertical" and "horizontal" authority, transformed "exclusive jurisdiction" into "coordinate jurisdiction" with the Corps of Engineers, one of the very same agencies eliminated by Congress in 1920 from any licensing role. *See* App. A at A-14. The 1977 Conference Report, however, does not leave room for so implausible an interpretation: the Commission's "exclusive jurisdiction consists of functions . . . within the sole responsibility of the Commission to consider and to take final agency action on without further review by the Secretary [of Energy] *or any other executive branch official.*" H.R. Conf. Rep. No. 539, *supra*, at 75, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 946 (emphasis added).

Just last year, Congress enacted the Electric Consumers Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243 (1986), a statute which amended the Federal Power Act in part specifically to emphasize that the Commission is to give "equal consideration" to the concerns of environmental quality, including the preservation and enhancement of fish and wildlife, in licensing decisions. *Id. at* § 3(a),

100 Stat. at 1243 (1986) (amending Section 4(e) of the Federal Power Act).[6] ECPA is an express reaffirmation of Congress' view of the Federal Power Act as the statute governing the environmental requirements for hydropower projects, and its reliance upon the Commission as the administrative body with sole responsibility for review of such matters.

The Court of Appeals did not refer to or discuss ECPA in its opinion.

The Court of Appeals conceded that there is nowhere to be found in sixty-seven years of legislative history any statement of congressional intent to dismantle the Commission's exclusive jurisdiction over hydropower projects. *See* App. A at A-17 - A-18. Rather, the court's decision was based exclusively upon speculation that the FWPCA Amendments of 1972 and a subsequent amendment, the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (1977), must have been intended, without any Congressional statement to that effect, to achieve that purpose. No provision of the FWPCA amendments of 1972 or 1977 expressly effects such a dramatic change in the established hydropower licensing scheme, however. Nor is such a change necessary. The Court of Appeals could not cite any legislative history even reflecting a suggestion that the water pollution control legislation was intended to apply to hydropower projects that had already been subjected to a thorough federal

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[6] Sections 3(b) and (c) of ECPA also strengthen the Commission's environmental role, in part by adding a new subsection 10(j) to the Federal Power Act which requires increased consideration of recommendations made by federal and state agencies pursuant to the Fish and Wildlife Coordination Act, Pub. L. No. 85-624, 72 Stat. 563 (1958).

review and that had never previously required any federal approval other than a license from the Commission.

The Court of Appeals' naked presumption that Section 404(a) "would seem" to apply to Commission-licensed projects, App. A at A-11, is one that cannot be allowed to stand in this case given the lack of direct or indirect legislative support. *See Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976). Indeed, the legislative history indicates the contrary view that Congress never intended Section 404(a) to apply to hydropower projects historically within the Commission's exclusive jurisdiction. In the face of a general transfer of Corps authority to the Environmental Protection Agency, Section 404, which was added by Senator Ellender as a floor amendment,[7] was intended merely to preserve some of the Corps' former jurisdiction, not expand it:

> Mr. President, this is a very simple amendment, and should not take long to explain.
>
> It simply *retains* the authority of the Secretary of the Army to issue permits for the disposal of dredged materials. This is essential since the Secretary of the Army is re-

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[7] The text of Section 404 was originally adopted by the Senate as an amendment to Section 402 of S. 2770. 117 Cong. Rec. S38857 (1971). It appeared as a separate section when considered by the House as H.R. 11896, 118 Cong. Rec. H10804 (1972), and was enacted into law in that form. 118 Cong. Rec. H33718 (1972).

This Court has specifically looked to statements made during debate over Section 404 as a guide to determining the legislative intent of the provision. *See Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 14-15 and 19-20 (1976).

> sponsible for maintaining and improving the navigable waters of the United States.

117 Cong. Rec. S38853 (1971) (statement of Senator Ellender) (emphasis added). And what was "retained" was authority that, prior to 1972, did not extend to privately built Commission-licensed hydropower projects or the power to veto Commission licenses. As regulations promulgated by the agency in 1968 stated:

> . . . the functions of the Chief of Engineers and the Secretary of the Army to authorize non-Federal water power projects or modifications of existing pre-1920 non-Federal water power projects were transferred to the Federal Power Commission by the Federal Water Power Act of 1920 (41 Stat. 1063).

33 Fed. Reg. 18672 (1968) (later codified at 33 C.F.R. § 209.120(d)(9) (1972)). The Corps' initial interpretation of Section 404(a) following the 1972 FWPCA amendments was also one which did not apply the permit requirement to Commission-licensed projects. *See Scenic Hudson Preservation Conference* v. *Callaway*, 370 F.Supp. 162, 164 (S.D.N.Y. 1973), *aff'd per curiam on district court opinion*, 499 F.2d 127 (2d Cir. 1974).

It is thus incorrect to assume, as does the Court of Appeals, that Congress intended Section 404(a) to impose upon the Corps the unprecedented responsibility for approval of Commission-licensed hydropower projects.

The Court of Appeals also considered the 1977 amendments to the FWPCA, and the fact that Commission-licensed projects were not among a number of stated exemptions from the licensing requirement

of Section 404(a). *See* App. A at A-19 - A-21. The court presumed from this omission an affirmative expression of congressional intent to repeal the Federal Power Act's scheme of exclusive licensing authority. *Id.* at A-24. This ignores the fact that no exemption would be necessary or expected because Congress never intended in its 1972 enactment that the FWPCA affect Commission-licensed projects. Similarly, it fails to give effect to the contemporaneous and express congressional confirmation of the Commission's exclusive jurisdiction over hydropower licensing in the 1977 Department of Energy Organization Act. *See supra* pp. 12-13.

The fundamental error made by the Court of Appeals was its presumption that a Section 404(a) permit is necessary to implement national environmental policy—that in the absence of the Corps, hydropower projects would remain environmentally unregulated and capable of subverting environmental standards. Congress has specifically and consistently provided otherwise, since 1920 subjecting the construction and operation of hydropower projects to a thorough independent review covering all matters that might affect the public interest. Environmental protection has historically been part of that public interest, and its implementation by the Commission in its exercise of exclusive jurisdiction has grown with evolving national policy. *See infra* pp. 21 *et seq.*

The Court of Appeals' errors thus are not merely those of failing to heed congressional intent. The more basic flaw is manifested in the court's approach to reconciling major statutory schemes of the kind at issue in this case. Under settled principles of statutory

construction, in the absence of an irreconcilable conflict a court's role is to give maximum possible effect to all statutes at issue. *See Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982); *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *United States* v. *Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) (Scalia, J.), *cert. denied*, 106 S.Ct. 1262 (1986); *see, e.g., Appalachian Power Co.* v. *United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980). Precisely that objective can be achieved in this case by recognizing both the Commission's exclusive jurisdiction over hydropower projects and its statutory, regulatory, and judicial obligation to implement national environmental protection policies in its licensing decisions.

The Court of Appeals purported to give "appropriate effect to both statutory provisions" in this case. App. A at A-25 n.116. But by abolishing the Commission's sole jurisdiction in order to extend application of the FWPCA, the Court of Appeals compromised an utterly central purpose of the Federal Power Act and thus failed to discharge its duty under the governing precedent. What the Court of Appeals actually effected was a repeal of the Federal Power Act by implication, an action unsupportable in the absence of a direct expression of legislative intent to repeal the scheme of exclusive jurisdiction.[8]

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[8] The same error was committed by the district court in *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F.Supp. 162 (S.D.N.Y. 1973), *aff'd per curiam on district court opinion*, 499 F.2d 127 (2d Cir. 1974), a case decided before many of this Court's recent opinions enunciating the proper standard for re-

A nearly identical statutory question was addressed by this Court in *Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976), which held that the FWPCA did not repeal the exclusive authority of the Atomic Energy Commission ("AEC") over the disposition of certain radioactive materials. What mattered to this Court there—as should matter here—was a preexisting regulatory scheme reflecting the need to avoid inevitable multi-agency disputes and the absence of the "clear indication of legislative intent that we might expect before recognizing such a change in policy." *Id.* at 24.

The Court of Appeals' cursory dismissal of *Train* hinges on a statement in the legislative history of the FWPCA suggesting that materials regulated under the Atomic Energy Act of 1954 ("AEA"), Pub. L. No. 68-703, 68 Stat. 919 (1954), were not intended to be covered, and the Court of Appeals' assertion here that the legislative history offers no guidance as to the question presented in this case. *See* App. A at A-15. This assertion, however, is simply not correct. *See supra* pp. 14-16. More important, the Court of Appeals ignores this Court's direction in *Train* as to the way in which the AEA and the FWPCA are to be reconciled. That analysis, and its applicability to this case, are clear: The AEA established a "pervasive

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conciling statutory schemes. *See Monongahela Power Co.* v. *Alexander*, App. B at B-7 - B-9. The district court in *Scenic Hudson* posits its conclusion, just as does the Court of Appeals here, on the totally erroneous statement that the Commission's compliance with environmental requirements would be voluntary, not mandatory. 370 F.Supp. at 170; App. A at A-24. *Scenic Hudson*, moreover, was decided prior to and did not have the benefit of Congress' expressions of intent in the Department of Energy Organization Act and ECPA.

regulatory scheme" which cannot be repealed absent a "clear indication of legislative intent." 426 U.S. at 24. At least as strong a "clear indication of legislative intent" would have to be shown in this case, given the even more comprehensive authority the Commission enjoys compared to the AEC. *See Pacific Legal Foundation* v. *State Energy Resources Conservation & Development Comm'n*, 659 F.2d 903, 927-28 n.39 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983).

In the absence of any statutory language or legislative intent of a congressional decision to reformulate the Commission's jurisdiction, the Court of Appeals' decision is clearly at odds with *Train*. It is, moreover, a precedent pursuant to which federal courts could freely rewrite legislation under the guise of "reconciling" it with other statutes that are not actually in conflict. A recent decision by the United States District Court for the Western District of Michigan, *National Wildlife Federation* v. *Consumers Power Co.*, No. G85-1146 (W.D. Mich. March 31, 1987), illustrates what can happen if courts are freed from *Train* by the Court of Appeals' decision in this case. The district court in the Michigan case, while acknowledging that there "may be strong policy arguments for allowing the FERC to exercise exclusive jurisdiction," proceeded, without any analysis or discussion, citing the Court of Appeals' decision here and *Scenic Hudson*, to deny the Commission's exclusive jurisdiction over the environmental question of the discharge of fish through the turbines of a Commission-licensed hydroelectric facility. *Id.*, slip op. at 16.

II.

THE COURT OF APPEALS' ATTEMPT TO STRIP THE COMMISSION OF ITS ENVIRONMENTAL ROLE IGNORES STATUTORY COMMANDS AND CONTRAVENES THIS COURT'S GOVERNING PRECEDENT

The Court of Appeals' conclusion that the Corps has licensing jurisdiction over hydropower projects under Section 404(a) of the FWPCA confronted that court with the specter of two different agencies conducting duplicative *de novo* environmental reviews that were not binding on each other. As the Court of Appeals acknowledged, however, the statutory scheme could not be interpreted to require the same facts about the same project to be used in the same inquiry by two different agencies. App. A at A-21 - A-22; *see Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968). This was a dilemma of its own making, and the Court of Appeals sought to escape from it by emasculating the Federal Power Act in a second way. What the court did was to announce that the Commission has no substantive environmental role in the issuance of hydropower project licenses, and to conclude as a consequence that no conflict exists between the Commission's review and the environmental review to be undertaken by the Corps in its permit proceedings.

This conclusion ends in one stroke the crucial and substantial environmental role that has been developed under the Federal Power Act by sixty-seven years of legislative, regulatory, and judicial action. Critical to the development of this role was this

Court's decision in *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), a case interpreting the Commission's duty under Section 10(a) of the Federal Power Act to issue licenses "in the public interest." *Id.* at 450. This Court held in *Udall* that the statutory "public interest" requirement must be satisfied with reference to the contemporary national environmental policies established by federal laws.[9] *Id.* at 437-444; *see also NAACP* v. *Federal Power Commission*, 425 U.S. 662, 669-70 (1976); *Appalachian Power Co.* v. *United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980). The FWPCA is itself precisely such a federal law whose policies are required to be implemented by the Commission through operation of the Federal Power Act.

Inexplicably, the Court of Appeals implicitly dismisses the teaching of *Udall* as establishing "the mere existence of an implied general obligation on [the Commission's] part to consider conservation factors in its deliberations." App. A at A-24.[10] The obligation is not "mere" or "implied" or "general," but an "explicit mandate" to ensure the "preservation . . . of water resources." *See NAACP* v. *Federal Power Commission*, 520 F.2d 432, 441-42 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976); *see also Public Service Comm'n*

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[9] At issue in the case were the Fish and Wildlife Coordination Act, Pub. L. No. 85-624, 72 Stat. 563 (1958) (current version at 16 U.S.C. §§ 661 *et seq.*), and the Anadromous Fish Act, Pub. L. No. 89-304, 79 Stat. 1125 (1965) (current version at 16 U.S.C. §§ 757a-757f (1982)).

[10] The Court of Appeals' only mention of *Udall* is a reference to the fact that the District Court had relied upon it. *See* App. A at A-23 n.105.

of New York v. *Federal Energy Regulatory Commission*, 589 F.2d 542, 558 (D.C. Cir. 1978) (Leventhal, J.). As recently as last year Congress reaffirmed the role of environmental factors in Commission licensing with the passage of ECPA. While expressly endorsing *Udall*, the Conference Report accompanying ECPA makes clear that Congress intended to enhance even further the environmental safeguards imposed by the Commission in licensing hydropower projects. H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. at 21-22, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2496, 2507-10. No interpretation of the Federal Power Act that disavows the Commission's clear and essential environmental role can possibly be consistent with these legislative commands or be made in the name of environmental protection.

In addition to the Federal Power Act statutory provisions, the Commission's own regulations and decisions give effect to *Udall* and further establish the legitimacy and scope of its environmental function. The agency has expressly declared its "authority" to implement the policies of the FWPCA as incorporated into Section 10(a) of the Federal Power Act, as well as its authority under the Federal Power Act to impose stricter environmental requirements than those specified under other federal environmental laws. *Sierra Club* v. *Nebraska Pub. Power District*, 55 F.P.C. 3048, 3058 (1976); *South Carolina Electric & Gas Co.*, 7 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,180 at 61,339 (May 21, 1979). The Commission has, moreover, committed itself to adhere to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1982), *see* 18 C.F.R. § 2.81 (1986), and has published guidelines for the submission of a compre-

hensive environmental analysis by applicants proposing major projects. *See* 18 C.F.R. pt. 2, App. A (1986). These guidelines, denigrated by the Court of Appeals as "precatory invitations for information," App. A at A-24, are in fact mandatory and, indeed, subject to supplementation at the discretion of the Commission staff. *See* 18 C.F.R. § 2.81(a)(1)(i) and pt. 2, App. A Preamble Para. 8 (1986).

There is no better reflection of the Commission's environmental obligation than the record of its performance in the very case before this Court.[11] Indeed, the most intensely explored subject during the Commission's seven-year review, much of it conducted through hearings on the record before an administrative law judge (40 volumes of testimony totalling 5,252 pages, with 138 exhibits), was the effect that the project or its alternatives would have on the environment. *See supra* pp. 5-6. The Corps participated in the Commission's licensing proceeding, submitting three sets of written comments concerning the project's environmental, navigational, and flood control effects. *Id.* at 6.

In contrast to the Commission's extensive, thorough environmental analysis, the Corps then conducted its own informal and brief environmental review, relying upon much of the same evidence and applying the

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[11] Although the Court of Appeals suggests in a footnote that the Commission did not actually subject petitioners' license application to "scrutiny" comparable to that which the Corps undertook, App. A at A-22 n. 100, the court made no analysis whatsoever of the factual record in the case. In fact, the Court of Appeals drew no conclusions about the level of environmental scrutiny performed by either the Commission or the Corps.

same statutory policies, but reaching a contrary result.

The Commission has a statutory, regulatory, and judicially-enforced mandate to implement the federal environmental laws, and has an essential role in national enforcement of environmental policy. The Court of Appeals' wholesale dismissal of that obligation poses a clear and palpable threat to the operation of the Federal Power Act. More generally, the approach employed by the Court of Appeals threatens the effective implementation of any federal law, environmental or otherwise, particularly those implemented by agencies charged to act "in the public interest". This Court must reestablish the environmental role of the Commission under the Federal Power Act and in so doing, reestablish the proper approach to be taken by reviewing courts in interpreting federal legislation.

III.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

April 13, 1987

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1201

MONONGAHELA POWER COMPANY, *et al.*
v.

JOHN O. MARSH, JR.,
Secretary, Department of the Army, *et al.*,
APPELLANTS,
FEDERAL ENERGY REGULATORY COMMISSION,
INTERVENOR.

No. 81-1203

MONONGAHELA POWER COMPANY, *et al.*
v.

JOHN O. MARSH, JR.
Secretary, Department of the Army, *et al.*,
THE SIERRA CLUB, *et al.*,
APPELLANTS,
FEDERAL ENERGY REGULATORY COMMISSION,
INTERVENOR.

No. 81-1282

MONONGAHELA POWER COMPANY, *et al.*
v.
JOHN O. MARSH, JR.,
STATE OF WEST VIRGINIA,
APPELLANT,
FEDERAL ENERGY REGULATORY COMMISSION,
INTERVENOR.

Appeals from the United States District Court for the District of Columbia

(Civil Action No. 78-01712)

Argued June 18, 1982

Decided January 13, 1987

Before ROBINSON, *Circuit Judge*, BAZELON, *Senior Circuit Judge*,* and GASCH,** *Senior District Judge.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: The Federal Water Pollution Control Act Amendments of 1972,[1] in Section 301(a), make generally unlawful the discharge of any pollutant into the navigable waters of the United States.[2] This legislation,

* *Senior Circuit Judge* BAZELON did not participate in the consideration of this opinion.

** Of the United Stated District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

[1] Pub. L. No. 92-500, 86 Stat. 816 (1972) (principally codified as amended at scattered sections of 33 U.S.C. (1982)) [hereinafter cited as codified].

[2] "Except as in compliance with [designated sections of the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1982).

however, in Section 404(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites.[3] The single issue posed by these consolidated appeals is whether a permit is required to discharge fill material into navigable waters during construction of a hydroelectric facility previously licensed by the Federal Power Commission (FPC).[4] The District Court answered that question in the negative.[5] We disagree.

I

Monongahela Power Company, on behalf of Allegheny Power System, Inc., applied to FPC for a license to construct a 1000-megawatt pumped-storage hydroelectric facility on the Blackwater River in the Canaan Valley of Tucker County, West Virginia.[6] This project contemplates erection of two dams creating two reservoirs, which would inundate more than 7,000 acres of freshwater wetlands.[7]

An initial decision by an administrative law judge denied the application, finding that the project would devastate the wetlands as a unique and diverse botanical and wildlife

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[3] Id. § 1344(a) (1982).

[4] Section 402(a)(1)(A) of the Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565, 583 (codified at 42 U.S.C. 7172(a)(1)(A) (1982)), transferred FPC authority over the issuance and renewal of hydroelectric licenses to the Federal Energy Regulatory Commission (FERC). See text *infra* at notes 66-67.

[5] *Monongahela Power Co. v. Alexander*, 507 F. Supp. 385 (D.D.C. 1980).

[6] *Monongahela Power Co.*, Project No. 2709 (F.P.C. June 10, 1976) at 2, Joint Appendix (J. App.) 159 (administrative law judge's initial decision).

[7] *Id.* at 25, J. App. 182.

habitat.[8] FPC, however, concluded that these admitted losses, though substantial, could be mitigated,[9] and accordingly issued the license.[10]

The project's sponsors, with the Commission's license in hand, then applied to the Army Corps of Engineers for a Section 404(a) permit authorizing them to discharge fill material into navigable waters in the course of construction of the planned hydroelectric facility.[11] The Corps held public hearings, received written comments, and issued a decision denying the permit on the ground that the project would have an unacceptably adverse impact on the Canaan Valley wetlands, and could not be justified on the basis of feasible alternatives.[12]

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[8] *Id.* at 59, J. App. 216. The judge further found that "none of the proposed mitigation plans appears reasonably appropriate or feasible to effectively outweigh the negative aspects inherent in the adoption of the proposed project, requiring the flooding of a considerable part of the floor of Canaan Valley and radically changing its whole interdependent environment." *Id.* In denying the application as proposed, the judge, however, approved an alternate plan, *id.* at 66, J. App. 223, which would have required inundation of only 700 acres. *Id.* at 36-37, J. App. 193-194.

[9] *Monongahela Power Co.*, Project No. 2709 (F.P.C. Apr. 21, 1977) at 28, J. App. 261 (opinion and order).

[10] *Id.* The grant of the license is the subject of three petitions for review pending in this court. The court has heard oral argument on these petitions, but has stayed further proceedings pending resolution of the instant appeals. *Sierra Club v. FERC*, Nos. 77-1736, 77-1737, 77-1845 (D.C. Cir. June 15, 1981) (order).

[11] Letter from J. H. Bail, Director, Power Engineering, Allegheny Power System, to District Engineer, United States Army Engineer District, Pittsburgh, Pa., (Jan. 23, 1978), J. App. 58.

[12] District Engineer's Findings of Fact at 11, J. App. 695 (July 14, 1978). Like FPC's administrative law judge, see note 8 *supra* and accompanying text, the District Engineer noted that the "muskeg, swamp forest, [and] wet meadows [] harbor a diversity of plants and animals . . . made possible only because of the size of the wetlands and the juxtaposition of the habitat types," and declared that the loss of these would be "an irreplaceable one." *Id.*

The Monongahela group then instituted this litigation in the District Court against the Secretary of the Army and other officials.[13] Although Monongahela had invoked the jurisdiction of the Corps of Engineers in its quest for the permit, it now claimed that the Corps had no power to require a permit of an FPC-licensed project.[14] On cross-motions for the summary judgment, the District Court ruled in favor of Monongahela.[15] Reaching only the jurisdictional question,[16] the court held that the Corps had no authority to regulate discharges incidental to construction of Monongahela's hydroelectric facility because FPC had already licensed it.[17] Our review thus extends only to that determination.[18]

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[13] Complaint, *Monongahela Power Co. v. Alexander*, Civ. No. 78-1712 (D.D.C.) (filed Sept. 12, 1978), J. App. 47. We refer to the Monongahela group as Monongahela. The State of West Virginia and six conservation groups were permitted to intervene. More usually we refer to the defendants and these intervenors (all now parties in this court) collectively as the Secretary. Additionally, FERC has intervened in these appeals.

[14] Complaint, *supra* note 13, ¶¶ 29-32, J. App. 47-48.

[15] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 392.

[16] Monongahela had also claimed that FPC's prior licensing decision was res judicata on all issues the Corps could consider, Complaint, *supra* note 13, ¶¶ 38-46, J. App. 49-51; that the Corps was required to hold a formal adjudicative hearing on the permit application and to render a decision on the record, *id.* ¶¶ 47-56, J. App. 52-53; that various ex parte communications between Corps personnel and outside parties had tainted the proceeding and thus deprived Monongahela of due process, *id.* ¶¶ 57-61, J. App. 53-54; and that the Corps' decision was arbitrary, capricious, contrary to law, and not based upon substantial evidence, *id.* ¶¶ 62-66, J. App. 54-55. Since the District Court concluded that the Corps lacked jurisdiction to grant or deny a permit for construction of Monongahela's project, the court did not consider these contentions.

[17] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 392.

[18] See text *infra* at note 118.

Monongahela's position, which the District Court accepted, rests on the premise that beginning with the Federal Water Power Act of 1920,[19] Congress consolidated administrative authority over hydroelectric projects, and vested it originally in FPC and thereafter in FERC, its successor.[20] The opposing argument is predicated upon the Federal Water Pollution Control Act Amendments of 1972,[21] which in Section 301(a) broadly declare unlawful "the discharge of any pollutant by any person,"[22] and then in Section 404(a) require a permit from the Corps for any discharge of dredged or fill material into navigable waters.[23] The Secretary points out that Congress expressly exempted enumerated activities from the permit requirement[24] and alluded to no intention to except FPC-licensed hydroelectric projects therefrom.[25] Consequently, the Secretary contends, there is no room for imposition of an implied dispensation for the statutory scheme.

II.

Prior to 1920, the responsibility for licensing and overseeing hydroelectric facilities was dispersed among several

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[19] Act of June 10, 1920, ch. 285, 41 Stat. 1063 (current version codified at 16 U.S.C. §§ 791a-825r (1982)).

[20] Brief for Appellees at 20-29.

[21] *Supra* note 1.

[22] 33 U.S.C. § 1311(a) (1982) (quoted *supra* note 2).

[23] *Id.* § 1344(a). See generally *United States v. Riverside Bayview Homes, Inc.*, ___ U.S. ___, ___, 106 S.Ct. 455, 457, 88 L.Ed.2d 419, 424 (1985) (under § 301, "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404"); *P.F.Z. Properties, Inc. v. Train*, 393 F.Supp. 1370, 1381 (D.D.C. 1975); *United States v. Bradshaw*, 541 F.Supp. 880, 882 (D. Md. 1981); *United States v. Alleyne*, 454 F.Supp. 1164, 1169-1170 (S.D.N.Y. 1978).

[24] See 33 U.S.C. § 1344(f), (r) (1982).

[25] Brief for Federal Appellants at 25-27.

arms of the Federal Government, including Congress[26] and the Secretaries of War,[27] Agriculture,[28] and the Interior.[29] Resulting jurisdictional and policy conflicts complicated the expansion of hydroelectric power, and led to adoption of a new regulatory regime.[30]

The Federal Water Power Act of 1920[31] created FPC and assigned it the task of licensing and overseeing waterpower projects.[32] The Commission, which originally was composed of the Secretaries of War, Agriculture, and the Interior,[33] assumed "powers [t]heretofore exercised by the Secretaries in connection with water-power development

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[26] Rivers and Harbors Act of 1899, ch. 425, §§ 9, 10, 30 Stat. 1151 (current version codified at 33 U.S.C. §§ 401, 403 (1982)) (requiring congressional consent to obstructions into navigable waters).

[27] River and Harbor Act of 1890, ch. 907, 26 Stat. 453 (requiring consent of Secretary of War to abutments beyond harbor line). See also S. Rep. No. 180, 66th Cong., 1st Sess. 3-6 (1919) (history of legislation).

[28] Act of Feb. 1, 1905, ch. 288, 33 Stat. 628 (current version codified at 16 U.S.C. § 472 (1982)) (authority over hydroelectric facilities on national forest land).

[29] Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (authority over facilities on public lands).

[30] 3 B. Schwartz, The Economic Regulation of Business and Industry 1821 (1973).

[31] Act of June 10, 1920, ch. 285, 41 Stat. 1063 (current version codified at 16 U.S.C. §§ 791a-825r (1982)).

[32] Congress subsequently granted the Commission regulatory authority over electric power and natural gas. See Federal Power Act, ch. 687, tit. II, 49 Stat. 838 (1935) (current version codified at 16 U.S.C. §§ 791a-825r (1982)); Natural Gas Act of 1938, ch. 556, 52 Stat. 821 (codified as amended at 15 U.S.C. §§ 717-717w (1982)).

[33] Act of June 10, 1920, ch. 285, § 1, 41 Stat. 1063. The Secretaries were replaced by five full-time appointed members in 1930. Act of June 30, 1930, ch. 572, § 1, 46 Stat. 797 (codified as amended at 16 U.S.C. § 792 (1982)).

under their several jurisdictions."[34] As the Supreme Court has recounted, the Act

> was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.[35]

These and other characterizations of the newly-born FPC reflect the centralization of powers previously exercised by other federal entities independently,[36] with the goal of eliminating duplicative work, overlapping functions, and jurisdictional disputes.[37] In this sense, as the District Court noted, FPC's authority is "comprehensive."[38] The exclusivity of FPC's domain is clear, however, only with respect to the functions it inherited upon passage of the 1920 Act. There was, to be sure, a consolidation of extant responsibilities, but certainly no preemption of subsequently-enacted legislation.

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[34] S. Rep. No. 180, 66th Cong., 1st Sess. 6 (1919).

[35] *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180, 66 S.Ct. 906, 919, 90 L.Ed. 1143, 1158 (1946).

[36] See, e.g., *Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. 25 (1918) [hereinafter *Water Power Hearings*] (bill necessary "in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view") (statement of O.C. Merrill, Department of Agriculture); see generally *Chemehuevi Tribe v. FPC*, 160 U.S.App. D.C. 83, 91-93, 489 F.2d 1207, 1215-1217 (1973) (history of Federal Power Act), *rev'd in part on other grounds*, 420 U.S. 395, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).

[37] *Water Power Hearings*, *supra* note 36, at 26.

[38] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 387. See *FPC v. Union Elec. Co.*, 381 U.S. 90, 98-99, 85 S.Ct. 1253, 1258-1259, 14 L.Ed.2d 239, 245-246 (1965).

A half-century later, Congress made another radical change in legislative policy[39] by adopting the Federal Water Pollution Control Act Amendments of 1972.[40] The product of a strong bipartisan movement in Congress[41] "to restore and maintain the chemical, physical and biological integrity of the Nation's waters,"[42] this enactment marked the ascendancy of water-quality control to the status of a major national priority.[43] Components of this effort were Section 301(a)'s broad ban on discharge of pollutants into navigable waters,[44] and Section 404(a)'s provision authorizing the Secretary to grant permits exempting therefrom the discharge of dredged or fill materials at specific disposal sites.[45]

Congress was aware that the 1972 enactment would have far-reaching consequences,[46] and recognized that some other legislative objectives would have to be reconciled

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[39] See 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Comm. on Environment and Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 352 (Comm. Print 1973) [hereinafter cited as Legislative History] (statement of Rep. John A. Blatnik, Chairman, Committee on Public Works). The Committee considered the bill "a landmark in the field on environmental legislation." *Id.*, *reprinted in* 1 Legislative History at 350.

[40] Pub. L. No. 92-500, 86 Stat. 816 (1972) (principally codified as amended at scattered sections of 33 U.S.C. (1982)).

[41] See 118 Cong. Rec. 33712 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 208 (statement of Sen. Tunney).

[42] 33 U.S.C. § 1251(a) (1982).

[43] 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 350 (statement of Rep. Blatnik).

[44] 33 U.S.C. § 1311(a) (1982) (quoted *supra* note 2).

[45] *Id.* § 1344(a).

[46] See 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 350 ("far-reaching national commitment") (statement of Re. Blatnik); 118 Cong. Rec. 33712 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 208 ("decisive redirection in national policy") (statement of Sen. Tunney).

with the new pollution-control efforts. As the chairman of the House Committee on Public Works explained, "[t]hroughout the development of this most important legislation the committee could not forget the broad potential effects [on] competing priorities . . . [including] . . . energy supply . . . and protection of our natural resources."[47] It hardly can be said that the prescription of additional requirements for hydroelectric projects was an utterly unforeseen or inappropriate consequence.

Narrowing our scrutiny to Sections 301(a) and 404(a), we easily discern an effort to halt the systematic destruction of the Nation's wetlands.[48] Congress insisted upon stringent federal discipline in an effort to curb ecological pollution and degradation without interfering unjustifiably with farming, forestry, and other legitimate activities reserved for regulation primarily by local governments.[49] The result was dual scheme empowering the Corps of Engineers to issue permits pursuant to guidelines promulgated under Section 404(b)(1),[50] authorizing the states to establish and administer their own permit systems for specified dis-

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[47] 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 352 (statement of Rep. Blatnik).

[48] 123 Cong. Rec. 26697 (1977), *reprinted in* 4 Comm. on Environment and Public Works, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act, at 869 (Comm. Print 1978) [hereinafter cited as Clean Water Act Legislative History] (statement of Sen. Muskie). Senator Muskie explained the significance of wetlands: "They represent a principle [sic] source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife." *Id.*

[49] *Id.*, *reprinted in* 4 Clean Water Act Legislative History, *supra* note 48, at 869-870.

[50] 33 U.S.C. § 1344(b)(1) (1982).

charges upon approval by the Administrator of the Environmental Protection Agency (EPA).[51]

III

Indisputably, construction of Monongahela's proposed hydroelectric facility will entail discharges of dredged and fill material into navigable water.[52] Consequently, Sections 103(a) and 404(a) would seem to require a Corps permit for such discharges unless some exemption is available.[53] Although Section 404(f) specifically excludes a number of activities from the permit requirement,[54] it contains no express exception for FPC-licensed hydroelectric projects. We are thus confronted by the question whether such an exception may properly be implied.

In the only case to address the problem squarely, *Scenic Hudson Preservation Conference v. Callaway*,[55] the Second

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[51] *Id.* §§ 1344(g), (h); see *United States v. Riverside Bayview Homes, Inc.*, *supra* note 23, ___ U.S. at ___ n.1, 106 S.Ct. at 457 n.1, 88 L.Ed.2d at 424 n.1 ("[w]ith respect to certain waters, the Corps' authority may be transferred to States that have devised federally approved permit programs"); H.R. Rep. No. 830, 95th Cong., 1st Sess. 100-101 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 284-285 (explaining conference version of state program). EPA may approve a state permit system only if it includes "substantive decisionmaking criteria at least as stringent as [the Section] 404(b) guidelines." 123 Cong. Rec. 38996 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 419 (statement of Rep. Harsha).

[52] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 388.

[53] See 33 U.S.C. § 1344(f)(1) (1982); see also note 23 *supra*. Section 404(f) of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1600 (amending 33 U.S.C. § 1344(f) (1976)), allows structures such as dikes and dams to be *maintained* without a permit, but did not lift the requirement of a permit for *construction* of these structures.

[54] See 33 U.S.C. § 1344(f) (1982).

[55] 370 F. Sup. 162 (S.D.N.Y. 1973), *aff'd per curiam*, 499 F.2d 127 (2d Cir. 1974).

Circuit affirmed a ruling that a Corps permit was needed for the discharge of dredge and fill material incidental to hydroelectric construction despite prior licensure by FPC.[56] The District Court in that proceeding considered and rejected the very argument pressed by Monongahela in the present cases:[57] that an exception to the Federal Water Pollution Control Act Amendments should be inferred on the ground that "Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long-settled policy . . . of allowing that agency unique control over the production of hydroelectric power."[58] The court instead concluded that "Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested . . . ."[59] If Congress desired to exempt FPC licensed facilities, the court noted, "the remedy rests in Congress' hands . . . ."[60]

Congress amended the Act in 1977,[61] only three years after the Second Circuit affirmed *Scenic Hudson*. If perchance Congress did not care for *Scenic Hudson*, it had an excellent opportunity at that time to overturn it, but it chose not to do so. And the continued omission from the 1977 Amendments, of any exemption for FPC-licensed projects is "striking,"[62] given the fact that *Scenic Hudson*

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[56] *Scenic Hudson Preservation Conference v. Callaway*, *supra* note 55, 370 F.Supp. at 171.

[57] See text *supra* at note 20.

[58] *Scenic Hudson Preservation Conference v. Callaway*, *supra* note 55, 370 F.Supp. at 170.

[59] *Id.*

[60] *Id.*

[61] See note 53 *supra*.

[62] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 388.

had attached decisive importance to that omission from the 1972 legislation.[63]

The District Court, however, felt that nonetheless the impact of *Scenic Hudson* had been "diminished" by two subsequent events.[64] The first was a reference in the Conference Report on the Department of Energy Organization Act of 1977 to "exclusive jurisdiction . . . over certain functions transferred from the FPC."[65]

When, in that legislation, Congress restructured the federal approach to energy problems, it reallocated many of the powers theretofore exercised by FPC, including issuance and renewal of hydroelectric licenses,[66] to the newly-created Energy Regulatory Commission (FERC).[67] The Conference Report mentioned this licensing authority as one of the activities within FERC's "exclusive jurisdiction."[68] The District Court, attributing great significance to the word "exclusive," treated this statement as congressional support for the conclusion that the Corps of Engineers lacked statutory authority over Monongahela's FPC-licensed hydroelectric project.[69] We find that the court erred in doing so.

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[63] See text *supra* at notes 59-60.

[64] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 388.

[65] H.R. Rep. No. 539 (Conf.), 95th Cong., 1st Sess. 75 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 946 [hereinafter cited as Conference Report], pertaining to Pub. L. No. 95-91, § 402(a), 91 Stat. 582 (1977) (codified at 42 U.S.C. § 7172(a) (1982)) ("Section 402(a) describes the exclusive jurisdiction of the [Federal Energy Regulatory] Commission over certain functions transferred from the FPC")

[66] 42 U.S.C. § 7172(a)(1)(A) (1982).

[67] *Id.* § 7172(a) (1982).

[68] Conference Report, *supra* note 65, at 75, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 946.

[69] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 389.

The Conference Report itself explains the meaning of the terminology the court relied upon. "This exclusive jurisdiction," it said, "consists of functions transferred from the FPC which will be within the sole responsibility of [FERC] to consider and to take final agency action on without further review by the Secretary [of Energy] or any other executive branch official."[70] This category of FERC authority[71] was set off in contradistinction to other vestigial functions of the former FPC, which were either made solely the Secretary's responsibility[72] or left as "incidental power" available to both FERC and the Secretary.[73] Put another way, FERC's "exclusive jurisdiction" simply denoted that it was to be the highest unit in a vertical line with respect to decisions in the areas specified, including licensure; it had nothing to do with a relationship of FERC to other federal bodies on a horizontal line. Thus the conferees' use of the words "exclusive jurisdiction"—which are not found in the statute itself—is fully and sensibly comprehended without imparting an exaggerated importance to them. It follows that although the Department of Energy Organization Act undoubtedly endowed FERC richly with authority,[74] it did not expand the jurisdiction it derived from its predecessor so as to preclude the Secretary of the Army from exerting his powers over the

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[70] Conference Report, *supra* note 65, at 75, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 946.

[71] See 42 U.S.C. § 7172(a) (1982).

[72] See 42 U.S.C. § 7151(b) (1982) (placing functions not vested in FERC under Secretary's authority); *id.* 7172(f) (exempting certain matters from FERC's jurisdiction); see also Conference Report, *supra* note 65, at 76, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 947.

[73] [T]he Secretary as well as the Commission, may utilize the incidental power contained in the Federal Power Act or the Natural Gas Act." Conference Report, *supra* note 65, at 76, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 947.

[74] See S. Rep. No. 164, 95th Cong., 1st Sess. 6.

Nation's navigable waters.[75]

The second event inducing the District Court's belief that *Scenic Hudson's* force had been dissipated was the Supreme Court's 1976 decision in *Train v. Colorado Public Interest Research Group.*[76] As we read *Train*, however, it does not assist the present analysis. The issue there was whether EPA's authority under the Federal Water Pollution Control Act to control the disposal of nuclear waste encompasses materials subject to regulation by the Atomic Energy Commission under the Atomic Energy Act.[77] Although that question bears a superficial resemblance to the one before us, the factor determinative in *Train* is completely absent here. The *Train* Court based its decision upon a "rather explicit statement of [congressional] intent to exclude AEA-regulated materials from the FWPCA."[78] Congress has not, however, manifested comparably any purpose to exclude FPC-licensed hydroelectric projects from Section 404(a)'s permit requirement when otherwise applicable. On the contrary, as we have seen, Congress omitted hydroelectric installations from the list of facilities specifically exempted from that requirement, and did not articulate an exclusionary intent even in the face of the

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[75] Nor is a second reference to "exclusive" authority cited by the District Court apposite. In *First Iowa Hydroelec. Coop. v. FPC, supra* note 35, the Court sustained FPC's jurisdiction against state regulation, holding that the federal power preempted conflicting state policy. 328 U.S. at 182, 66 S.Ct. at 920, 90 L.Ed. at 1159. This cannot be reliably extrapolated to the proposition that FPC's jurisdiction was exclusive with respect to another federal agency whose relevant powers were conferred long thereafter, and whose primary statutory mission implicates very different objectives.

[76] 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976).

[77] *Id.* at 3-4, 96 S.Ct. 1939, 48 L.Ed.2d at 437.

[78] *Id.* at 22, 96 S.Ct. at 1948, 48 L.Ed.2d at 448; see also *id.* at 24, 96 S.Ct. at 1948-1949, 49 L.Ed.2d at 449 ("the legislative history reflects, on balance, an intention to preserve the preexisting regulatory plan") (footnote omitted).

inclusionary judicial interpretation announced in *Scenic Hudson.*[79]

Moreover, the posture of *Train* was the exact converse of that of the case before us. There EPA had adopted regulations exempting from its licensing program all materials covered by the Atomic Energy Act.[80] Here the Corps of Engineers had promulgated a regulation explicitly requiring a Section 404(a) permit for "[a]ny part of a structure or work licensed by the Federal Power Commission that involves the discharge of dredged or fill material into the waters of the United States."[81] The deference due an

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[79] See text *supra* at notes 59-63.

[80] *Train v. Colorado Pub. Interest Research Group, supra* note 76, 426 U.S. at 8, 96 S.Ct. at 1941, 48 L.Ed.2d at 440.

[81] 33 C.F.R. § 323.3(e) (1982). In July, 1982, shortly after submission of this case, the Corps of Engineers revised the regulations affecting permits for the discharge of dredged or fill materials into navigable waters of the United States. See 47 Fed. Reg. 31794 (1982) (codified at 33 C.F.R. pts. 320, 323 (1986)). Although the new regulations do not include § 323.3(e), which had expressly required a Corps permit for FPC-licensed projects, the clear effect of the revisions in their entirety is still to mandate a Corps permit for the type of FPC-licensed project sought to be undertaken by Monongahela here. Revised § 323.3(a) provides that

> [i]f a discharge of dredged or fill material is not exempted by § 323.4 of this part or permitted by [new] 33 C.F.R. Part 330, an individual or regional Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

33 C.F.R. § 323.3(a) (1986). FPC-licensed projects are not expressly exempted from the permit requirements under revised § 323.4. See also *infra* at notes 85-94. Furthermore, new § 330.5(a)(17) would not relieve Monongahela of the burden of obtaining a Corps permit in this case. That section describes a type of project licensed pursuant to the Federal Power Act that would not be subject to the individual or regional permit requirement:

> Fills associated with small hydropower projects as existing reservoirs where the project which includes the fill is licensed by the Federal Energy Regulatory Commission under the Federal Power

agency's construction of its governing statute[82] fortifies the dissimilarity of the two cases.[83]

We realize that the histories of the pertinent statutes do not themselves conclusively answer the question we

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Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Federal Energy Regulatory Commission (see 18 C.F.R. 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal . . . .

33 C.F.R. § 330.5(a)(17) (1986). But the project proposed by Monongahela calls for construction of two new reservoirs and a plant with a generating capacity in excess of 1500 kw, see text *supra* at notes 6-7—a project the Corps of Engineers has already found to involve a serious, adverse and irreversible impact on the environment, see note 12 *supra* and accompanying text—and thus a facility subject to the § 404 individual or regional permit requirement as implemented by the revised regulations. Particularly since the parties have not informed us of any inconsistent interpretation of the effect of the new regulations, we can only conclude that the revisions in the regulations to have no significant role in the resolution of the issue in this case.

[82] See, e.g., *United States v. Riverside Bayview Homes, Inc.*, *supra* note 23, ___ U.S. at ___, 106 S.Ct. at 461, 88 L.Ed.2d at 429 (Army Corps of Engineers' construction of Federal Water Pollution Control Act Amendments of 1972 "entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress"); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90, 99 (1985); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694, 701-703 (1984); *Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728, 736 (1982); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965); *Power Reactor Dev. Co. v. International Union of Elec. Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924, 932 (1961); *Capitol Technical Serv., Inc. v. FAA*, ___ U.S. App.D.C. ___, ___, 791 F.2d 964, 970 (1986); *Storer Communications, Inc. v. FCC*, 246 U.S.App.D.C. 146, 150, 763 F.2d 436, 440 (1985); *Eagle Picher Indus.*,

face.[84] At this juncture, however, we can conclude only that the Power Act does not provide adequate justification for ignoring the express and unambiguous directive of the subsequently-adopted Pollution Control Act Amendments.

U.S.App.D.C. 146, 150, 763 F.2d 436, 440 (1985); *Eagle Picher Indus., Inc. v. EPA*, 245 U.S.App.D.C. 196. 201 n.5, 759 F.2d 922, 927 n.5 (1985).

[83] The *Train* Court disavowed any dependence upon EPA's interpretation of the Federal Water Pollution Control Act. 426 U.S. at 8 n.8, 96 S.Ct. at 1941 n.8, 48 L.Ed.2d at 440 n.8. We believe, however, that the Corps' construction is a factor properly to be considered since we have no express legislative intent to guide us. See cases cited *supra* note 82.

[84] Nor does the recent decision in *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984), aid resolution of the dispute before us. An issue confronting the Court there was whether § 8 of the Mission Indian Relief Act of 1891, 26 Stat. 714, requires a FPC license to obtain the consent of an Indian tribe before operating a facility on its reservation lands. Section 8 authorizes private parties to contract with Indians, subject to approval by the Secretary of the Interior, for the right to construct a flume or other appliance for the conveyance of water through Indian lands. Finding nothing in the legislative history of the Act to suggest that Indians were to have any greater right than other private landowners to resist exertions of congressional authority, and citing its earlier ruling in *FPC v. Tuscarora Indian Nation*, 362 U.S.99, 118, 80 S.Ct. 543, 554, 4 L.Ed.2d 584, 597 (1960), that Congress intended the Federal Power Act to encompass Indian lands, the Court held that the Mission Indian Relief Act did not enable Indians "to override Congress' subsequent decision that all lands, including tribal lands, could, upon compliance with the provisions of the [Power Act], be utilized to facilitate hydroelectric projects." *Id.* at 787, 104 S.Ct. at 2117-2118, 80 L.Ed.2d at 769-770. See, e.g., H.R. Rep. No. 910, 66th Cong., 2d Sess. 8 (1920) (elimination by conferees of proposed amendment to Power Act requiring Indian consent; "no reason why waterpower should be singled out from all other uses of Indian reservation land for special action of the council of the tribe"). In the case at bar, unlike *Escondido*, there is no indication that Congress intended FPC-licensed hydroelectric projects to be exempt from compliance with the additional standards established by the Federal Water Pollution Control Amendments of 1972; indeed, we think the statutory scheme signifies the contrary. See text *infra* at notes 85-117.

Monongahela, however, would have us read into the latter a double-barreled exemption, enabling it to sidestep the anti-discharge mandate of Section 301(a) and simultaneously escape the permit requirement of Section 404(a). We turn, then, to an analysis of Section 404(a) and its express exceptions to determine whether such an implied dispensation for FPC-licensed projects would be in keeping with the statutory scheme.

IV

The exemptions to Section 404(a)'s permit program may be briefly categorized. First, the Corps of Engineers may issue general permits in lieu of requiring individual applications when multiple discharges cumulatively have but minimal adverse environmental effects and the activities contemplated are similar in nature and pass muster under the Section 404(b)(1) guidelines.[85] Second, certain activities leading only to minor discharges are exempt from the permit requirement[86] because Congress felt that they could be more effectively dealt with in "best management practices" reviews[87]—an alternative regulatory approach affording, under the aegis of a state "a degree of protection

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[85] 33 U.S.C. § 1344(e)(1) (1982); see H.R. Rep. No. 830 (Conf.), 95th Cong., 1st Sess. 100 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 284; see generally *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985).

[86] 33 U.S.C. § 1344(f)(1) (1982).

[87] 123 Cong. Rec. 38996 (1977) (statement of Rep. Harsha), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 420-421. The statute allows certain activities to be regulated under an areawide management program instead of by the case-by-case permit scheme of § 404. 33 U.S.C. § 1288 (1982). Activities conducted pursuant to a best-management practice must comply with the Section 404(b)(1) guidelines. Id. § 1288(b)(4)(B)(iii).

comparable to that of section 404(b)(1) guideline review."[88] Activities qualifying for this treatment include normal farming, silviculture, ranching, maintenance, drainage, and road construction.[89] Third, discharges approved under qualified state programs do not need the federal permit.[90] A state program displaces the federal, however, only if the Section 404(b)(1) guildlines strictures are met or exceeded.[91] Finally, a fourth statutory exception exempts those federal projects specifically identified by Congress.[92] To be free of the Section 404(a) permit requirement, the sponsor of such a project must have submitted to Congress as "adequate" environmental impact statement "including consideration of the guidelines developed under" Section

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[88] See 123 Cong. Rec. 39187 (1977) (statement of Sen. Muskie), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 471 ("[e]ach individual activity or practice must be scrutinized in light of the section 404(b)(1) guidelines and approved by the Administrator before the permit exemption is available").

[89] 33 U.S.C. § 1344(f)(1) (1982); see generally *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925-926 (5th Cir. 1983).

[90] 33 U.S.C. § 1344(g) (1982).

[91] See note 52 *supra*.

[92] See 33 U.S.C. § 1344(r) (1982). This exemption was included in the conference version of the bill in recognition of the constitutional principle of separation of powers. H.R. Rep. No. 830 (Conf.), 95th Cong., 1st Sess. 104 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 288. The narrow nature of this exemption is under scored by the fact that it applies only to discharges integral to construction of designated federal projects. See *id.*, *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 288; 123 Cong. Rec. 38995 (1977), reprinted in 3 Clean Water Act Legislative History, *supra* note 48, at 416 ("[t]he conferees did not intend to exempt other discharges which may be associated generally with constructing Federal projects, but which are ancillary to the specific activities submitted to and approved by Congress") (statement of Rep. Stark). Accord 123 Cong. Rec. 38997 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 420 (statement of Rep. Harsha); 123 Cong. Rec. 39209 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 524-525 (statement of Sen. Baker).

404(b)(1).[93] Of central importance in the House debates was the assurance that consideration and acceptance of the environmental impact statement by Congress would be "equivalent to" review under the Section 404(b)(1) guidelines.[94]

When analyzed in this fashion, Section 404 transmits a crisp and unwavering message: all significant discharges, whether or not exempt from the permit requirement, must be subjected to Section 404(b)(1) scrutiny or its equivalent; some competent body, be it the Corps of Engineers, EPA, Congress, or the state where the discharge is to occur, must perform a Section 404(b)(1) review.[95] Every type of discharge embraced by an exemption must survive a check of this kind. We think fidelity to the legislative scheme precludes any implication of an additional exemption for FPC-licensed projects when, at the bare minimum, FPC did not subject its license applicants to a review under substantive standards comparable to those established pursuant to Section 404(b)(1).

The factors to be utilized in considering applications for a Section 404 permit are delineated in the implementing guidelines[96] mandated by the statute.[97] The guidelines declare that ("[t]he guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources."[98] The

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[93] 33 U.S.C. § 1344(r) (1982).

[94] 123 Cong. Rec. 39187 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 472 (statement of Sen. Muskie). Accord 123 Cong. Rec. 39209 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 524-525 (statement of Sen. Baker); 123 Cong. Rec. 39210 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 529 (statement of Sen. Wallop).

[95] See notes 85-94 *supra*.

[96] 40 C.F.R. pt. 230 (1986).

[97] 33 U.S.C. § 1344(b) (1982).

[98] 40 C.F.R. § 230.1(d) (1986).

guidelines specify additionally that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. . . ."[99] A series of considerations, warnings, and evaluative techniques comprises many pages of regulations controlling the issuance of permits.[100] Some absolute restrictions are imposed,[101] while other sections address the potential losses to be expected from discharges and the means for minimizing them.[102] These guidelines furnish the yardstick by which the legitimacy of any implied exemption must be measured.[103] If FPC did not subject license applications to some test substantially equivalent to that found in the Section 404(b)(1) guidelines, its action will not measure up to the congressional plan.

The District Court looked to FPC's statutory obligation to regulate in the "public interest,"[104] and the Supreme Court's interpretation of that provision as a call to explore, among other matters, " 'the public interest in preserving

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[99] *Id.* § 230.10(a).

[100] The guidelines in effect at the time the Corps of Engineers denied Monongahela a permit provided a more stringent framework for evalutaion of its application. See, e.g., 40 C.F.R. § 230.5(b)(8) (1978) ("[d]ischarge of dredged material in wetlands may be permitted only when it can be demonstrated that the site selected is the least environmentally damaging alternative"). These guidelines were replaced with more lenient, but still mandatory, standards for use by the Corps in reviewing applications. 45 Fed. Reg. 85344 (Dec. 24, 1980). The fact that the guideline criteria have been eased since Monongahela's permit application was denied is of no consequence here since, as will appear, FPC did not subject Monongahela's license application to scrutiny comparable to either level.

[101] See 40 C.F.R. § 230.10 (1986).

[102] See, e.g., *id.* §§ 230.50(b), 230.51(b), 230.52(b).

[103] The Corps also considers the standards set forth in 33 C.F.R. § 320.4 (1986), which include an assortment of additional factors.

[104] See 16 U.S.C. § 797(e) (1982).

reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wild life.' "[105] But the explicit conservation-oriented Section 404(b)(1) directives under which the Corps labors have nowhere been matched in the mandate given FPC. The District Court undertook a comparison of the Section 404(b)(1) guidelines with those under which FPC operated,[106] and felt that the latter "echo[] the balancing process" in which the Corps engages.[107] The fact, however, is that aside from other considerations, a critical difference renders the two radically distinct. The FPC guidelines were designed merely to assist license applicants in submitting information to FPC,[108] while Section 404(b)(1)'s are standards governing decisions by the Corps on permit applications.[109] The FPC guidelines imposed no direct restraints on FPC's deliberations or determinations; they did not indicate how FPC should treat the information it received;[110] nor was FPC obligated to seek specific goals in any wise analogous to those the Corps must strive for.[111] Moreover, the FPC guidelines assigned no relative weights to competing objectives, and provided FPC with no more assistance in its review than

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[105] *Monongahela Power Co. v. Alexander, supra* note 5, 507 F.Supp. at 391 (quoting *Udall v. FPC*, 387 U.S. 428, 450, 87 S.Ct. 1712, 1724, 18 L.Ed.2d 869, 883 (1967)).

[106] *Monongahela Power Co., supra* note 5, 507 F.Supp. at 391 (referring to 18 C.F.R. §§ 2.80-2.81 and app. A (1979)).

[107] *Id.*

[108] 18 C.F.R. pt. 2, app. A(1) (1986) (quoted *infra* note 110.)

[109] 40 C.F.R. § 230.2(b) (1986) ("[t]hese Guidelines *will be applied* in the review of proposed discharges") (emphasis added).

[110] "These guidelines . . . [i]dentify the kinds of information to be supplied by applicants to assist Federal Power Commission staff in an independent assessment of major Federal actions significantly affecting the quality of the human environment[.]" 18 C.F.R. pt. 2, app. A(1) (1986).

[111] See text *supra* at notes 96-103 and note 109 supra.

a general policy of adherence to the aims of the National Environmental Policy Act of 1969.[112] We would do violence to the legislative intent animating the Federal Water Pollution Control Act Amendments were we to find these unchanneled, precatory invitations for information equivalent to the rigorous study demanded of the Corps. Nor can we hold that the mere existence of an implied general obligation on FPC's part to consider conservation factors in its deliberations[113] created a format for decisionmaking, the absence of which is the crux of the present problem.

Given the two statutory sections and their respective legislative histories, congressional intent would be betrayed by implication of an exemption of FPC-licensed hydroelectric projects from the express requirements of the Water Pollution Control Act Amendments.[114] We do not view this

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[112] See 18 C.F.R. pt. 2, app. A(4)-(8) (1986).

[113] See text *supra* at notes 104-105.

[114] FERC urges us to find that § 401 of the Clean Water Act, 33 U.S.C. § 1341 (1982), provides an alternative to the statutory scheme for gaining an exemption from § 301's ban on discharges of pollutants into navigable waters. Supplemental Memorandum for Intervenor-Appellee at 3-6. Section 401 provides that

> [a]ny applicant for a federal license or permit to conduct an activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . . No license or permit shall be granted until the certification required by the section has been obtained . . . .

33 U.S.C. § 1341(a)(1) (1982). According to FERC, § 301 should be construed to allow permitting under § 401(a)(1), comprised of review by a state coupled with the grant of a permit or license under any one of a number of federal regulatory schemes, including the Federal Power Act. Supplemental Memorandum for Intervenor-Appellee at 4-6.

We reject this interpretation. FERC's approach is completely at odds with the plain language of § 301, which expressly describes the contours of permissible discharges: "Except as in compliance with this section

as a "repeal" of FPC authority[115] but as a reconciliation[116] seen by Congress as necessary to ensure the protection

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and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1982). Section 301 thus does not tolerate attempted avoidance of its ban through an application of § 401, which is omitted from § 301's enumeration of statutory sections. Furthermore, the legislative history of § 401 reveals that the quoted provision was intended merely to assure that "any water quality requirements established under State law, more stringent than those requirements established under [the Clean Water Act], also shall through certification become conditions of any Federal license or permit." S. Rep. No. 92-414, 92d Cong., 1st Sess. 69 (1971). This history indicates no more than that state standards of water quality were to be preserved under the Clean Water Act, see *EPA v. State Water Sources Control Bd.*, 426 U.S. 200, 219, 96 S.Ct. 2022, 2031, 48 L.Ed.2d 578, 591 (1976); *United States Steel Corp. v. Train*, 556 F.2d 822, 830 (7th Cir. 1977), and supports no suggestion that § 401 was intended in any way to supplant the need for obtaining a Corps permit. Lastly, FERC's proposed permitting scheme is inconsistent with our conclusion that FPC review of dredge and fill activities under the Federal Power Act is inadequate when measured against § 404(b)(1) guidelines. See notes 96-113 *infra* and accompanying text.

[115] See *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 391.

[116] We are advertent to the maxim that repeals by implication are not favored. E.g., *Watt v. Alaska*, 451 U.S. 259, 266-267, 101 S.Ct.. 1673, 1678, 68 L.Ed.2d 80,88 (1981); *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290, 301 (1974); *United States v. Hansen*, 249 U.S.App.D.C. 22, 26, 772 F.2d 940, 944 (1985), *cert. denied*, ___U.S. ___, 106 S.Ct. 1262, 89 L.Ed.2d 571 (1986). By giving appropriate effect to both statutory provisions, however, we repeal no legislation; on the contrary, we fulfill congressional intent. See e.g., *Reckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815, 842 (1984) (where two statutes are " 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective' ") (citations omitted); *McKelvey v. Turnage*, ___U.S.App.D.C. ___, ___, 792 F.2d 194, 206 (1986) (opinion concurring in part and dissenting in part) (no need to find implicit repeal where "there is no necessary conflict between the [two] statutes").

of a vital national interest.[117]

The judgment appealed from is reversed. Concluding, as it did, that FPC's licensing of Monongahela's hydroelectric project immunized it from an exercise of the Corps' accustomed authority, the District Court did not address other contentions pressed by Monongahela.[118] Accordingly, we remand the case in order that it may now do so, and engage in such further proceedings consistent with this opinion as may become necessary.

So ordered.

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[117] As it aptly has been said, "the Federal Power Act is not immune from effects of other subsequent acts of Congress," *Applachian Power Co. v. United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980).

[118] See note 16 *supra*.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

Civil Action No. 78-1712

MONONGAHELA POWER COMPANY, *et al.*,
Plaintiffs,

v.

CLIFFORD L. ALEXANDER, JR. LIEUTENANT GENERAL JOHN W. MORRIS, CORPS OF ENGINEERS, COLONEL MAX R. JANAIRO, JR.
Defendants,

THE STATE OF WEST VIRGINIA, THE SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, THE NATIONAL AUDOBON SOCIETY,
Intervenor-Defendants.

FILED
DEC. 19, 1980
JAMES F. DAVEY, Clerk

MEMORANDUM

Plaintiffs, three power companies, bring this action against the United States Army Corps of Engineers (the Corps) and various individuals acting in their official capacities. They seek injunctive and declaratory relief regarding the Corps' denial of their application for a permit for the Davis Pumped Storage Hydroelectric Project (the Project), a complex of dams designed to produce power. Prior to the Corps' denial, a license to construct and operate the Project had been issued by the Federal Power

Commission (FPC), the predecessor of the Federal Energy Regulatory Commission (FERC).[1] Plaintiffs contend that the Corps is without jurisdiction to either grant or deny a permit for the Project, that the Corps is barred by principles of res judicata and collateral estoppel from denying a permit to a project already licensed by FPC, and that the hearing procedure conducted by the Corps violated their Due Process rights. The State of West Virginia and six conservation organizations were granted leave to intervene to brief the Court on state-related and environmental issues. Jurisdiction is properly founded upon 28 U.S.C. § 1331 (1976) and 5 U.S.C. §§ 701-03 (1976). The matter is before the Court on plaintiffs' joint motion and defendants' cross motion for summary judgment.

Plaintiffs' threshold contention, that the Corps is without jurisdiction to either grant or deny a permit, is based on the premise that Congress has vested all authority over hydroelectric projects in the FPC and its successors, to the exclusion of any other federal agency. This comprehensive authority is dated back to the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (codified at 16 U.S.C. §§ 792 *et seq.* (1976)) (the Water Power Act). Defendants respond that the Corps has concurrent jurisdiction pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L. 92-500, 86 Stat. 816, 884 (codified at 33 U.S.C. § 1344 (Supp. III 1979)) (the FWPCAA). That section requires a permit issued by the Corps for any discharge of dredged or fill material into navigable waters, a process which construction of the Project would admittedly involve. Resolution of this apparent statutory conflict entails an inquiry into the origins and purposes of both Acts.

Prior to the enactment of the Water Power Act, federal control over water power was characterized by duplicative

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[1] Unless the context demands otherwise, the energy licensing authority will be referred to as the FPC, rather than the FERC.

and overlapping regulatory jurisdiction. Authority to license water power projects was shared among three agencies: the Department of Interior, the Department of Agriculture, and the Secretary of War. J. Kerwin, *Federal Water Power Legislation* 107 (1926). The Water Power Act was intended to coordinate the exercise of federal jurisdiction, H.R.Rep.No. 61, 66th Cong., 1st Sess. 5 (1919); and to that end the Act created the FPC with authority over federal water power projects. *See* 41 Stat. 1063 (1920).

At the time of its passage, the Water Power Act was administratively interpreted as concentrating all licensing authority in the FPC and providing "a complete and detailed scheme for the development . . . of all the water power resources of the public domain." 32 Op. Att'y Gen. 525, 528 (1921). The FPC's general counsel concluded that "it was the purpose of Congress to confer exclusive jurisdiction on the Federal Power Commission . . . over the matter of issuing licenses" for hydroelectric power projects. 1 FPC Ann.Rep. 156 (1921). This contemporaneous construction by the administering agency, combined with similar subsequent interpretations, is entitled to "great respect." *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 1074-75, 43 L.Ed.2d 279 (1975).

During the existence of the FPC, the courts interpreted this authority in the same manner. Prominent among the decisions is *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946), in which the Court examined the purposes and powers of the Water Power Act and found that

> It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of

> the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted. *Id.* at 180, 66 S.Ct. at 919.

Courts at other times have used comparable language, emphasizing that the purpose of the Act was to provide for "comprehensive control" over water resources, *FPC v. Union Electric*, 381 U.S. 90, 98, 85 S.Ct. 1253, 1257, 14 L.Ed.2d 239 (1959); to "centralize the authority" over water resources in one Government agency, *Northwest Paper Co. v. FPC*, 344 F.2d 47, 51 (9th Cir. 1965); and to give the FPC "exclusive jurisdiction." *United States v. Idaho Power Co.*, 85 F.Supp. 913, 915 (D.Id. 1949).

Congress itself has also construed the authority of the FPC as exclusive. When the authority was transferred to FERC pursuant to the Department of Energy Organization Act of 1977, Pub.L.No. 95-91, § 402(a)(1), 91 Stat. 565, 584 (codified at 42 U.S.C. § 7172(a)(1) (Supp. III 1979) (the Energy Organization Act)), Congress stated in the Conference Report that:

> Section 402(a) describes the exclusive jurisdiction of the Commission over certain functions transferred from the FPC. This exclusive jurisdiction consists of functions transferred from the FPC which will be within the sole responsibility of the Commission to consider and to take final agency action on without further review by the Secretary or any other executive branch official.

H.R.Rep.No. 539, 95th Cong., 1st Sess. 75 (Conference Report), *reprinted in* [1977] U.S.Code Cong. & Ad.News 854, 925, 946. Specifically included in this "exclusive jurisdiction" is power to issue licenses for hydroelectric projects. Energy Organization Act, § 402(a)(1)(A), 91 Stat. 584 (codified at 42 U.S.C. § 7172(a)(1)(A) (Supp. III 1979)).

While defendants and intervenors dispute the label "exclusive," and while the language used to describe the FPC's

authority does vary, the reach of its jurisdiction prior to 1972 was clear. Congress had created an agency and centralized in it *all* federal authority for licensing federal water power projects. This exclusive licensing authority preempted any conflicting state regulation, *see First Iowa Hydroelectric*, 328 U.S. at 181-82, 66 S.Ct. at 919-20, and precluded any concurrent federal jurisdiction. This historic statutory policy was apparently reaffirmed at the time of the passage of the Energy Organization Act. Were it not for the existence of the FWPCAA, there would be no difficulty in holding that the FPC's power here was exclusive.

However, the FWPCAA does exist and does disrupt the otherwise clear statutory mandate of the FPC. Section 404 of the FWPCAA, 33 U.S.C. § 1344 (Supp. III 1979), gives the Corps power to grant or deny permits for discharges of "dredged or fill material" into navigable waters. There is no exception for FPC-licensed hydroelectric projects. Since the Project concededly requires such a discharge, the Corps asserts that it, as well as the FPC, has the duty and the authority to license the project. Defendants contend that had Congress intended to preserve the FPC's exclusive licensing procedure, it could easily have done so and that the absence of any exemption in the 1972 FWPCAA is indicative of Congressional intent to give the Corps the power disputed here. They argue that this construction is futher strengthened by the Clean Water Act of 1977, in which Congress passed a number of specific exemptions to the Corps' licensing authority but again failed to exempt hydroelectric projects. Pub.L.No. 95-217, § 67, 91 Stat. 1566, 1600-06 (codified at 33 U.S.C. § 1344(f) and (r) (Supp. III 1979)). This omission in 1977 is all the more striking in that Congress was on notice that the FWPCAA had been construed as applicable to water power projects. *See Scenic Hudson Preservation Conference v. Calloway*, 370 F.Supp. 162 (S.D.N.Y. 1973), *aff'd per curiam*

499 F.2d 127 (2d Cir. 1974) (discussed more fully *infra*). The seemingly inevitable conclusion is that Congress, by not exempting FPC-licensed projects, intended them to be subject to the Corps' licensing jurisdiction.

That, indeed, was the holding in the only case which has confronted the apparent conflict between the FPC's exclusive jurisdiction and the Corps' general authority:

> Con Ed would infer an exception from the [FWPCAA] for hydroelectric plants on the theory that Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power. The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands . . . .

Scenic Hudson Preservation Conference v. Callaway, 370 F.Supp. 162, 170 (S.D.N.Y. 1973). This finding was affirmed in a per curiam opinion describing the District Court's opinion as "well-considered." 499 F.2d at 128. While such a precise holding would normally govern any disposition here, two intervening events have diminished its authority.

First, Congress has now given an indication that the FPC's hydroelectric jurisdiction should be construed as exlusive, notwithstanding the FWPCAA. See H.R.Rep.No. 539, *supra*. Although the statement clearly describes the FPC jurisdiction as exclusive, and was made after both

the FWPCAA and the decision in *Scenic Hudson*, it is difficult to determine the weight it should be accorded. Had the Energy Organization Act actually created the FPC power at issue here, the Conference Report language would be controlling. The FPC's power would be exclusive, whatever duplicative licensing power the Corps might have possessed would have been repealed,[2] and the decision in *Scenic Hudson* overruled. If, on the other hand, the statement were merely a legislative comment upon a previously enacted statute, it would still be entitled to "some consideration as a secondarily authoritative expression of expert opinion." *Bobsee Corp. v. United States*, 411 F.2d 231, 237 n.18 (5th Cir. 1969); 2A Sands, *Statutes and Statutory Construction*, § 49.11, at 266 (4th ed. 1973); *see Esquire, Inc. v. Ringer*, 591 F.2d 798, 803 (D.C.Cir. 1978). While allowing the statement even this minimal consideration would cast doubt upon the continuing validity of *Scenic Hudson*, the better course is to interpret its authority as somewhere between the two extremes. The Energy Organization Act did not simply transfer to FERC certain powers of the FPC; it created additional ones and consolidated others. It was a sweeping transformation of the entire field of energy regulation. As such, the statement is as much an indication of the jurisdiction Congress intended to allocate to FERC in 1977 as it is an expression of its understanding of prior legislation. Although it did not, perhaps, conclusively overrule *Scenic Hudson*, nor repeal whatever concurrent jurisdiction the Corps may have had under the FWPCAA, the statement is sufficiently authoritative to undermine the precedential value of the contrary conclusion in *Scenic Hudson*.

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[2] Defendants and Intervenors have questioned whether the Energy Organization Act should be construed as repealing by implication the concurrent jurisdiction of the Corps. Because the Court's disposition of the issue of the Corps' jurisdiction, that question need not be dealt with.

The second intervening event was *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), where the Supreme Court ruled that there do exist inferable exceptions to the facially inclusive licensing authority vested by the FWPCAA in the Corps. The FWPCAA was found inapplicable to the discharge of nuclear pollutants, the regulation of which the Atomic Energy Commission (AEC) considered within its sole jurisdiction. The Court noted that the regulatory authority of the AEC was "comprehensive," *id.* at 5, 96 S.Ct. at 1940, and preemptive of any state regulation. *Id.* at 15-16, 96 S.Ct. at 1944-45. It further noted that it would expect a "clear indication of legislative intent" to change such a "pervasive regulatory scheme." *Id.* at 24, 96 S.Ct. at 1948. Examining the relevant legislative history, it then found that Congress had specifically intended to preserve the preexisting regulatory plan. *Id.* If there were similar legislative history in the FWPCAA preserving the jurisdiction of the FPC, Train would obviously be controlling. However, no such history can be found and that crucial distinction allows each side to claim Train as its own. Defendants contend that the case allows this Court to look only to the legislative history of the FWPCAA to find an exemption for hydroelectric projects. Since no such exemption can be found, none could have been intended, just as *Scenic Hudson* concluded. Plaintiffs insist, conversely, that *Train* overrules *Scenic Hudson* by implication, and this appears the better argument.

The key lies in the three-step approach implicit in the Court's analysis in *Train*. First, there must be a comprehensive or pervasive regulatory plan which is threatened with change by a subsequent statute. *Train*, 426 U.S. at 24, 96 S.Ct. at 1948. If such a situation exists, the Court will next search for Congressional intent to preserve the preexisting regulatory framework, a search which was successful in *Train*. Not finding any intent to preserve, a third step would be necessary before the Court would rec-

ognize any change in an established regulatory plan: it would look for and normally expect to find a specific Congressional intent to make such a change. *Id.* This third step of the analysis is based on long-established law, *see United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169, 96 S.Ct. 1319, 1323, 47 L.Ed.2d 653 (1976); *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936), but is an approach *Scenic Hudson* failed to use. The only burden assumed there was searching for an intent to preserve the FPC's jurisdiction through an exemption from the FWPCAA. To the extent that *Scenic Hudson* looked no further, *Train* must be seen as modifying its result.

However, even the third step implicit in the *Train* analysis does not dispose of the dispute here. Although the regulatory scheme administered by the FPC is as comprehensive and pervasive as the nuclear regulation at issue in *Train*, the legislative history of the FWPCAA reveals neither an intent to preserve the FPC jurisdiction, nor an intent to change it. Thus to resolve the statutory conflict other principles of statutory construction must be examined.

The first principle applicable is the "cardinal rule" that repeals by implication are not favored. *Morton v. Mancari*, 417 U.S. 535, 549, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. at 503, 56 S.Ct. at 352); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193, 89 S.Ct. 354, 358, 21 L.Ed.2d 334 (1968). That is undoubtedly the situation here. If the Corps' concurrent and duplicative jurisdiction over FPC-licensed projects is found valid, the statutory policy of centralized, coordinated licensing procedures for such projects, dating back to 1920, will be repealed. There is also no doubt that the repeal would be by implication since there is no evidence that Congress specifically and consciously intended to effect such a repeal. Under such cir-

cumstances the second applicable precept is that a court can find an implied repeal only if the two statutes are "irreconcilable," *Morton v. Mancari*, 417 U.S. at 550, 94 S.Ct. at 2482; or clearly "repugnant." *United States v. Borden Co.*, 308 U.S. 188, 198-99, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939); *see also TVA v. Hill*, 437 U.S. 153, 189-90, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117 (1978). In essence, then, the Court's duty here is to compare the two statutes in purpose and operation, to attempt to give effect to both, and to repeal the exclusive authority of the FPC only if it is clearly repugnant to the purpose and operation of the FWPCAA.

An analysis of the sets of factors used by the two agencies in reaching determinations under the respective statutes reveals no substantial or overriding differences. The operation of the FWPCAA requires that before the Corps issues a permit under Section 404, all relevant factors must be carefully weighed and the benefits balanced against the detriments. These factors include "conservation, *economics*, esthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, naviation, recreation, water supply, water quality, *energy needs*, safety, food production, and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a) (1979) (emphasis added). A permit will only be granted if it is in the "public interest." *Id. See also* W. Rodgers, *Environmental Law* § 4.7, at 407 (1977). The Corps must also consider whether the benefits of the project outweigh the damage to wetlands. 33 C.F.R. § 320.4(b)(a) (1979).

The operation of the FPC under its exclusive statutory authority has been described by the Supreme Court:

> The question whether the proponents of a project "will be able to use" the power supplied is relevant to the issue of the public interest. So too is the regional need for the additional power. But the inquiry

> should not stop there. A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreationally purposes, and the protection of wildlife.
>
> The need to destroy the river as a waterway, the desirability of its demise, the choices available to satisfy future demands for energy—these are all relevant to a decision.

Udall v. FPC, 387 U.S. 428, 450, 87 S.Ct. 1712, 1724, 18 L.Ed.2d 869 (1967). Moreover, the FPC has adopted as part of its decision-making process the guidelines and goals of the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1976) (NEPA). See 18 C.F.R. §§ 2.80-2.81 and App. A (1979). That procedure echoes the balancing process used by the Corps in Section 404 permit applications. See, Rodgers, *supra* at 407. Specifically included among the factors which must be reported to and evaluated by the FPC are "areas of critical environmental concern, e.g., wetlands" 18 C.F.R.App. A § 2.2.3, at 137 (1979). Finally, the FPC also uses its own regulations on conservation of natural resources, see *id.* at § 2.14, which were issued pursuant to the Federal Power Act, 16 U.S.C.§§ 791a-825r

(1976), a successor to the Water Power Act. It is thus apparent that each agency evaluates approximately the same elements in arriving at the ultimate goal of the public interest. Consequently, the operations of each agency under the relevant statutes are neither irreconcilable nor repugnant to each other.

Even allowing that the operations may be similar, defendants nevertheless assert that the purposes and goals of each agency under the respective statutes are so different as to be inconsistent. They contend, citing *Scenic Hudson*, that although the FPC may review the same environmental factors as the Corps, it is not required to do so. This is not entirely accurate. The Supreme Court and other courts have consistently held that such factors are relevant to an FPC decision and must be considered. *NAACP v. FPC*, 425 U.S. 662, 670 & n.6, 96 S.Ct. 1806, 1811 & n.6, 48 L.Ed.2d 284 (1976) (consideration of environmental and conservation questions a subsidiary purpose of the Act); *Udall v. FPC*, 387 U.S. at 450, 87 S.Ct. at 1724 (FPC determination can only be made after exploration of all relevant issues including recreation, wildlife, and wilderness preservation); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 614 (2d Cir. 1965) (statutory phrase "recreational purposes" encompasses conservation of natural resources and maintenance of natural beauty). It should also be noted that while environmental factors are specifically relevant to the FPC's determination of public interest, many other national statutory policies are beyond its consideration. *NAACP v. FPC*, 425 U.S. at 670, 96 S.Ct. at 1811. In addition, NEPA requires the FPC to consider the relevant environmental factors. *Greene County Planning Board v. FPC*, 455 F.2d 412, 418-20 (2d Cir. 1972).

Defendants' objections are thus reduced to the proposition that while both agencies may be required to consider approximately the same factors, the Corps is required to weigh more heavily the environmental issues, especially

those concerning preservation of wetlands. This difference in perspective is attributed to the disparity between the purposes of the statutes: the Water Power Act's prime orientation is power development while the FWPCAA's is preservation of water resources. Although this difference is not insignificant, the similarities in purpose and operation are more persuasive. The Court's duty here is to repeal the FPC's exclusive authority only if it is positively repugnant to or irreconcilable with the FWPCAA. Given the FPC's substantial environmental responsibilities, it cannot fairly be said that the difference in emphasis and perspective of the FWPCAA rises to a level sufficient to support an implied repeal. Accordingly, an exemption for FPC-licensed projects from the licensing requirements of the FWPCAA must be inferred. The Court finds that the Corps was therefore without jurisdiction to either grant or deny the permit at issue here.

An appropriate order follows.

/s/ John Lewis Smith, Jr.
United States District Judge

Dated: December 19, 1986

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

Civil Action No.
78-1712

MONONGAHELA POWER COMPANY,*et al.*,
Plaintiffs,

v.

CLIFFORD L. ALEXANDER, JR. LIEUTENANT GENERAL JOHN W. MORRIS, CORPS OF ENGINEERS, COLONEL MAX R. JANAIRO, JR.
Defendants,

THE STATE OF WEST VIRGINIA, THE SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, THE NATIONAL AUDOBON SOCIETY,
Intervenor-Defendants.

FILED
DEC. 19, 1980
JAMES F. DAVEY, Clerk

ORDER

The Joint Motion of Plaintiffs for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, having been presented, and the Court being fully advise, this Court declares that the United States Army Corps of Engineers is without jurisdiction either to grant or deny a permit for construction of the Davis Project pursuant to 33 C.F.R. § 1344 because the Davis Project has been licensed previously by the Federal Energy Regulatory Commission which possesses exclusive jurisdiction over such projects, and

IT APPEARING that there is no genuine issue as to any material fact and that plaintiffs are entitled to summary judgment as a matter of law, it is hereby

ORDERED: that plaintiffs' motion for summary judgment be hereby granted.

/s/ John Lewis Smith, Jr.
United States District Judge
12/19/80

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1201
September Term, 1986
CA No. 78-01712

MONONGAHELA POWER COMPANY, *et al.*
v.

JOHN O. MARSH, JR. Secretary,
Department of the Army, *et al.*

United States Court of
Appeals For the District
of Columbia Circuit

FILED MAR 24, 1987

GEORGE A. FISHER
CLERK

And Consolidated Cases 81-1203, 81-1282

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

O R D E R

The suggestion for rehearing *en banc* of appellees Monongahela Power Company, *et al.* has been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular

active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that apellees' suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER CLERK

BY: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Bork, Silberman, Williams and D. H. Ginsburg would grant the suggestion for rehearing *en banc*.

APPENDIX D

1. Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 § 3(a), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1243

Section 4. General powers of Commission

The Commission is authorized and empowered—

* * *

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens, of the United States, or to any association of such citizens or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the nav-

igation capacity of any nivigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceeded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

2. Sections 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), as amended by the Electric Consumers Protection Act of 1986, Pub. L. 99-495 § 3(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1243-45

Section 10. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a)(1) Modification of plans, etc., to secure adaptability of project

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e). If necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion of the license.

3. Section 23(b) of the Federal Power Act, 16 U.S.C. § 817 (1982)

Section 23(b). Projects not affecting navigable waters; necessity for Federal license

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

4. Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311(a) (1982).

Section 301. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

5. Section 404(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344(a) (1982)

Section 404. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.